No. 393
Filed Jan. 7, 1899.

IN THE

Supreme Court of the United States.

THE UNITED STATES, Appellant,
vs.
ANTHONY F. NAVARRE and eighty-nine other members of the Pottawatamie tribe of Indians, Appellees. } No. 393.

Appeal from the Court of Claims.

J. H. McGOWAN, Attorney for Appellees.
JOHN WHARTON CLARK, of Counsel.

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BRIEF FOR APPELLEES.

The findings of fact of the Court of Claims are set forth on pages 11 and 12 of the Record, and a concise statement of the case on pages 17 and 18 of the Record. Appellees might safely rest this case upon the able and exhaustive argument made by Judge Howry in the opinion of the court in this case. The remarks of counsel for appellees, therefore, will be confined to a few suggestions in the line of the Court's opinion, and a brief review of the errors raised by counsel for appellant.

Brief of Argument.

There is no common ground on which the appellant and appellees meet in this case. Each bases the liability, protection, and policy of the Government in respect of these claimants on entirely different acts of Congress. On the one hand, appellant relies upon a part of the Sixteenth Section of the Act of June 30, 1834, to determine the protection and policy of the

United States and fix its liability. (Sec. 16, 4 Stats., 731.) On the other hand, the appellees rely, as the bases of their action, upon Article X of the Treaty with the Pottawattamie tribe of Indians, proclaimed August 7, 1868 (15 Stats., 533); the Act of March 3, 1891, which gave jurisdiction to the Court of Claims in this case and also executed the said Tenth Article of said Treaty, provided it should be deemed not to be self-executing (26 Stats., Sec. 1, p. 1010); and the Act of May 28, 1830, which gave authority to the tribes of Indians living east to exchange their lands and remove west of the Mississippi River, and also promised protection from "all disturbances and interruptions from *other* Indians and *other* persons" to such tribes as would thus consent (4 Stats., 411). Article I of the Treaty of June 5th and 17th, 1846, also promised "all proper care and parental protection" to the Pottawattamie tribe of Indians, in contemplation of, and harmony with, said Act of May 28, 1830. (9 Stats., 833.)

History of the Removal of the Pottawattamie Indians West of the Mississippi.

The history of the Pottawattamie tribe of Indians, both as to its original locality and its universally peaceful condition, is well known to this Court. The Pottawattamies originally inhabited a large portion of the present States of Michigan, Indiana, and Illinois. The settlement of these territories was so rapid in the later part of the twenties, that it became necessary for the United States to extinguish the Indian title to the lands therein; and for the purpose of making it possible that an exchange of lands might be made with these semi-civilized tribes for other lands west of the Mississippi River, the Act of May 28, 1830, was passed by Congress. Under the authority of this Act the Pottawattamie tribe of Indians, as provided in the Treaty of Chicago, proclaimed February 21, 1835, were removed to the Missouri River, the lands of the greater portion

of the tribe being located within the present State of Iowa, and adjoining what was known as the "Indian country" at that time. (Act of June 30, 1834, 4 Stats., Sec. 1, p. 731.) These fertile plains and valleys rapidly filled up by white emigrants, and again the Pottawattamie tribe of Indians were induced to give up their valuable reservation and their homes, and the Treaty of June 5th and 17th, 1846, was entered into whereby they relinquished all the lands conveyed to them by the Treaty of Chicago, and accepted a reservation on the Kansas River as a permanent home (Revision of Indian Treaties, 164; Id 181). These claimants (appellees) resided on this reservation on the Kansas River as members of the Pottawattamie tribe when these depredations were committed, and when the Treaty of February 27, 1867—the Tenth Article of which is relied upon in this case—was entered into.

The Policy Pursued and the Protection Afforded by the United States to those Indian Tribes Exchanging their Lands East and Moving West to the Mississippi River.

It will be admitted that the policy pursued, and the protection afforded to those tribes of Indians that were authorized, under the Act of May 28, 1830, to exchange their lands east of the Mississippi River for lands west, were more liberal and ample than toward the wild Indians of the "Indian country." Neither will it be disputed that the Pottawattamie tribe of Indians was removed under the provisions of the Treaty of Chicago, proclaimed February 21, 1835, possessing the full authority and protection of said Act of May 28, 1830. Neither will it be denied that they were removed to lands west of the Mississippi River, to which the Indian title had been extinguished, touching on the "Indian country," they having been located upon the Missouri River, the principal part of their reser-

vation being in the present State of Iowa, then a part of Michigan Territory. It will also be admitted that the protection of the Act of May 27, 1830, remained with the Pottawattamie Indians, from the time of their location upon their reservation west of the Mississippi, until it was ceded by them to the United States by their Treaty of June 5th and 17th, 1846.

It was this Act of May 28, 1830, that was especially designed to give authority to the President to remove to the westward, without the confines of any State or organized Territory, the semi-civilized tribes of the east, and to afford them protection in that inhospitable country. The reason for this unusual protection is very plain, when we keep in mind the fact that these friendly semi-civilized tribes were removed to lands contiguous to the "Indian country," where the wild and warlike tribes inhabited. The lands for which they exchanged their lands east were those the Indian title to which had originally belonged to some of their warlike brethren. Yet these often frequented the lands which they had given up to the United States for the purpose of pillage. These wild tribes of the west were not friendly, generally, to the semi-civilized tribes from the east, because they had forsaken their ancient customs and were walking in the path of the white man. Moreover, as the country surrounding these lands, for which these Indians exchanged their lands in the east, was practically uninhabited by white settlers, they were afforded no protection of law. Under these conditions the Sixth and Seventh Sections of this humane Act of May 28, 1830, were necessary to the proper protection of these friendly semi-civilized Indians. Section 6, is as follows:

And be it further enacted that it shall and may be lawful for the President to cause such tribe or nation to be protected, at their new residence, against all interruption or disturbance from any *other* tribe or nation of Indians, or from any *other* person or persons whatsoever.

Nay more, we urge that it was one of the inducements which led these Indians to leave their homes east of the Mississippi, that they were to be protected from "all disturbances and interruptions" from lawless white men and wild Indian tribes. They could never have been induced to give up their lands for settlement, if they had not been promised this extraordinary protection; and these Pottawattamie Indians understood that this same protection was to follow them to their reservation on the Kansas River. Not only that, but the United States recognized that it should follow them there, and in the First Article of the Treaty of June 5th and 17th, 1846, gave the "*promise* of proper care and parental protection" to these Indians who removed to the Kansas reservation, under said Treaty. The promise of protection from "all interruptions and disturbances" did not only run with the land, but also with the person and personality of the Pottawattamie tribe of Indians, who removed to the reservation on the Kansas River, at the instance of, and under an agreement with the United States. Justice toward these Indians would not permit the United States to say, that because it had induced them to leave their fertile reservation in the State of Iowa, greatly to the advantage of itself, that it had on that account, and because of that removal, relieved itself from the obligation to protect them as it had promised when it had induced them to remove from the east to the west of the Mississippi. That would be very closely akin to permitting a wrong doer to take advantage of his wrongful act.

When the Treaty of February 27, 1867, was entered into the Pottawattamie Indians understood that they had been entitled to this protection afforded by Section VI of the Act of May 28, 1830, and doubtless insisted upon the benefits of its provisions. Hence, the Tenth Article was incorporated into said Treaty. It is as follows:

It is further agreed that, upon the presentation to the Department of the Interior of the claims of said tribe for depre-

dations committed by *others* upon their stock, timber, or other property, accompanied by evidence thereof, examination and report shall be made to Congress of the amount found to be equitably due, in order that such action may be taken as shall be just in the premises.

It must be presumed that the framers of this article of the Treaty of February 27, 1867, were conversant with the laws applicable to the Pottawattamie Indians, and Indians in general. The Acts of May 28, 1830, and June 30, 1834, must have been familiar to them, in order to enable them to intelligently and safely draft this Treaty, and had they intended to mold it in the form of the Act of June 30, 1834, the words "*white men*," and not the word "*others*," would have been used in the Tenth Article of this Treaty. The word "*others*" is manifestly taken from Section VI of the Act of May 28, 1830, above set forth. The meaning of this word "*others*," used in this article of the Treaty, is manifest and needs no comment. Its common and usual meaning would make it apply to any person or persons, without respect of color, and to any tribe or nation of Indians, except the Pottawattamie tribe, or members thereof.

Appellant admits that appellees are entitled to a judgment from this Court for $19,467.30, because it was for property taken, injured, and destroyed, by the criminal acts of white men under the Act of June 30, 1834. This admission is doubtless made for the purpose of bolstering up the fallacious argument advanced by appellant, that so much of the claim was a recovery under the said Sixteenth Section of the Act of June 30, 1834. Such a deduction would not logically follow from the premises given by appellant, even on the supposition that the Sixteenth Section of the Act of June 30, 1834, operated over the reservation occupied by the Pottawattamie Indians at the time these depredations ocurred. A proposition which we deny. For, in the first place, a law specially applicable to these Indians would supersede and supplant the general Act of June 30, 1834, and, moreover, the Tenth Article of the Treaty of February

27, 1867, if that were not the case, would supersede the Act of June 30, 1834, in so far as it is in conflict with the same, it being the law of the land, as well as said Act of Congress, and later in date.

Appellant quotes the case of the United States *vs.* Perryman (100 U. S., 235) as an authority in this case. In that case the claimant did not rely upon the provisions of a subsequent treaty, as appellees have here. It is believed that had a subsequent treaty, in conflict with the Sixteenth Section of the Act of June 30, 1834, been before the Court in the Perryman case for determination (as in the Treaty now under consideration) the decision would have been different. The language of the Court, in that case, infers as much. Besides the Act of May 28, 1830, seems not to have been invoked by the claimant in the Perryman case. And the theft in that case, having been committed in the Indian Territory, it might be doubtful whether the Act of May 28, 1830, would apply to it. But that is not our case.

The Tenth Article of the Treaty of February 27, 1867, Executed by the Act of March 3, 1891.

But aside from the Acts of May 28, 1830, and June 30, 1834, appellees maintain that the Tenth Article of the Treaty of February 27, 1867, if it is not self-executing, is executed by the Act of March 3, 1891, giving the Court of Claims jurisdiction and authority to determine this cause. U. S. *vs.* Percheman (7 Pet., 51); Whitney *vs.* Robertson (124 U. S., 194). If the former Acts were entirely wiped out, this Tenth Article of the Treaty, executed by this Act of March 3, 1891, would give appellees a right of recovery in this Court. The words on which we rely to carry this Treaty into complete effect, i. e., execute it, are as follows:

And said Court shall, in determining said cause, *ascertain* the amounts *due* and to whom due by reason of actual *damage* sustained.

These are not jurisdictional words. They are for the purpose of guiding the Court in its deliberation, and they are a full and complete guide to the Court in determining the actual amount of damages sustained, and to whom they are due.

The Pottawattamie Reservation on the Kansas River Not Indian Country.

But if all these arguments should fail, then we urge that a complete answer to appellant's entire argument is found in the fact that the Pottawattamie reservation on the Kansas River was not within the "Indian country" at the time these depredations were committed. The lands on which the Pottawattamie tribe of Indians settled, on the Kansas River, had been ceded to the United States by the Kansas tribe of Indians on the 14th day of January, 1846. (Treaty of June 5th and 17th, 1846, with the Pottawattamie Indians, Art 4. Revision of Indian Treaties, p. 182; *id.*, p. 415.) The Sixteenth Section of the Act of June 30, 1834, has no application outside of the "Indian country." And any part of the Territory of the United States ceases to be "Indian country" as soon as the "original" Indian title is extinguished. The Indian title to these lands was extinguished by the purchase made by the United States from the Kansas tribe of Indians. Moreover these Pottawattamie Indians purchased their lands in Kansas from the United States after the "original" Indian title had been extinguished (Art. 3, Treaty of 1846, Revision of Indian Treaties, p. 181). These were lands, therefore, in which all title had vested in the United States—lands taken out of the "Indian country" by the purchase of the "original" Indian title—and it would be absurd to argue that these lands, thus taken out of the "Indian country," were again placed within its boundaries because it had been purchased by Indians. The logical sequence of that argument would be to make all lands occupied by Indians "Indian country." That can not be true. Fur Co. vs. the United

States (2 Pet., 358); Bates *vs.* Clark (95 U. S., 204); *ex parte* Crow Dog (109 U. S., 556).

We, therefore, respectfully submit that the judgment of the Court of Claims is correct, and ask this Court to affirm the same.

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